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**BY EMAIL**

Jeffrey Owens
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Via email: jeffrey.owens@oecd.org

Dear Mr Owens

**Clarification of the meaning of 'Beneficial Owner' in the OECD Model Tax Convention**

We refer to the discussion draft published on 29 April 2011 in relation to the meaning of "beneficial owner".

The current drafting of the commentary on this point post-dates the report on "double taxation conventions and the use of conduit companies". The amendments made at that time left the commentary in a state which may not have been entirely clear but the practice of many countries has bedded down. That is not to say that all countries take the same approach and that can lead to uncertainty as to the correct treatment.

The difficulty with trying to expand on and clarify what is currently said at paragraph 12 of the commentary on article 10 (dividends), and elsewhere, in relation to beneficial ownership is, in our view, twofold. First, it seems to us that the use of just the one term "beneficial owner" is a relatively blunt instrument given the broad range of transactions undertaken. Second, if the concern relates to inappropriate use of treaties, then surely the appropriate approach is to include suitable anti-conduit provisions or limitation of benefits clauses, an approach which the US has adopted for many years.

Just on that first point, the proposed drafting leaves us wondering what the position would be in relation to various commonly seen arrangements such as the following:

(a) consider a group finance company established to borrow from banks and then on-lend to members of its group. Such a group finance company may grant pledges over relevant bank accounts or have some form of "cash sweep" clause in the banking documents pursuant to which it is required to pay all or most of its receipts to the bank. Generally finance companies are not being interposed for withholding tax mitigation reasons but simply to enable cheaper financing arrangements to be sought from banks;

(b) the articles of many joint venture companies contain provisions requiring that if there are any distributable proceeds, those should be distributed to the shareholders as soon as possible;

(c) it is unclear to us whether the grant of a share pledge or pledge over a bank account would prejudice the requirement for beneficial ownership as construed under the new commentary; and

(d) Market standard documents in the repo and stock lending markets (e.g. the GMSLA, GMRA and OSLA) all include contractual obligations requiring the interim holder of the security to make payments equal to any income received to the original owner. There is an extensive body of practice around the treatment of such manufactured payments. The repo and stock loan markets are extremely sizable and aid liquidity. Increased uncertainty of treatment here would be unwelcome.

That is before one considers other arrangements such as fund vehicles, CDOs and securitisation vehicles, let alone bespoke tax-driven arrangements.

We have seen a copy of the submissions made by CIOT. We would concur that, for many of the reasons they give, the new wording is likely to increase uncertainty rather than reduce it. Our concern in this regard is exacerbated by difficult legal questions around the extent to which a change in the commentary now would be used by the courts to construe pre-existing treaties.

We would obviously be happy to discuss our comments should that be helpful to you.

Regards

**Eduardo Gracia / Paul Miller**

**Ashurst LLP**